

STATE OF SOUTH CAROLINA ) BEFORE THE PROCUREMENT PANEL  
COUNTY OF RICHLAND )

In re: Contract Controversy of )  
State of South Carolina )

*Claimant,* )

vs. )

New Venue Technologies, Inc. )

*Respondent.* )  
\_\_\_\_\_ )

**RESPONDENTS'**  
**MOTION FOR**  
**SANCTIONS PURSUANT**  
**TO SC CODE § 11-35-4330**

**RESPONDENT'S MOTIONS FOR FRIVOLOUS PROTEST SANCTIONS FOR**  
**CLAIMANT'S REQUEST FOR RESOLUTION**

Respondent, New Venue Technologies, Inc., ("NVTI") by and through its undersigned counsel, moves for frivolous protest sanctions for unsupportable allegations in Claimant's Request for Resolution dated September 30, 2013.

**RESPONDENT'S ALLEGES FRIVOLOUS FILING ON THE PART OF THE CLAIMANTS**  
**AS FOLLOWS**

1. NVTI is in the business of creating custom software solutions.
2. NVTI entered a contract with the State of South Carolina to develop a software solution to monitor software purchases, administrative fees owed to the State's Information Technology Management Office ("ITMO"), and licensing for the State of South Carolina, its agencies, and other public procurement units eligible to purchase software under term contracts with software vendors. Under this contract, all software purchases for the State of South Carolina were to be purchased through NVTI's software solution starting February 15, 2013.
3. NVTI developed the Software Acquisition Manager, a software solution to monitor software purchasing and licensing for the State of South Carolina and the solution was made available for software orders by state procurement officers on February 15, 2011. NVTI spent time

and capitol developing the software solution, staffing a help desk, traveling the state to train state procurement officers, and maintaining staff to process orders from the State.

4. No software orders were placed with the NVTI software solution until August 29, 2011. This failure to implement and delay on the State's part was an ongoing breach of contract.

5. From August 29, 2011 until the State wrongfully terminated NVTI's contract, only a portion of the States orders were placed with the NVTI software solution. This partial performance on the State's part was a breach of contract.

6. The State was in continuous breach of contract from February 2011 forward until the State wrongfully terminated the contract.

7. Well into the Contract term and during ITMO's delay, ITMO employees, including Defendant Lemmon acknowledged in writing that Plaintiff New Venue's web solution was "ready and has been fully tested" that it "was excellently designed" and that New Venue "exceeded our expectations." Further, the State acknowledged in writing that "delays on our (the State's) end" was the reason that the system delivered by Plaintiff New Venue to the State was "not fully implemented yet."

8. On numerous occasions ITMO employees were given demonstrations of the software solution developed by NVTI. ITMO employees were shown how reports were generated by the software in these demonstrations.

9. On numerous occasions ITMO employees requested reports and other data from the software solution developed by NVTI. NVTI delivered the requested data promptly, to the fullest extent that the State's non-compliance with its contract duties permitted.

10. State procurement officers for the State of South Carolina used the software solution developed by NVTI for two years and one month since the first order was placed on NVTI's solution on August 29, 2011.

11. On September 30, 2013, the State filed and served a frivolous and unfounded Request for Resolution against New Venue Technologies, alleging New Venue Technologies had breached the contract and falsely alleging that NVTI's software solution did not exist. The Request for Resolution was signed by Delbert Singleton, Norma Hall, and Debbie Lemmon.

12. An email correspondence between ITMO procurement officer Emmett Kirwan and Terris Riley of New Venue Technologies makes it clear that Mr. Kirwan was involved in attempting to develop a record to support the drafting of a false allegation that NVTI's software solution did not exist.

13. The first allegation against New Venue Technologies in the State's Request for Resolution Dated September 30, 2013, alleges the software solution developed by New Venue Technologies does not exist in paragraphs 11, 12, and 13 of the State's Request for Resolution:

“11. There are four static pages at the Internet domain [www.mysamcentral.com](http://www.mysamcentral.com).

However, New Venue refuses to provide login credentials to any ITMO staff.

12. ITMO is informed and believes that none of the web based reporting functionality required by the contract exists.

13. New Venue's failure to provide a web based solution, including the reporting functionality, is a breach of contract.”

14. Items 11, 12, and 13 allege that New Venue Technologies created what is commonly called "vaporware," namely, software that does not actually exist.

15. The request for resolution also alleged other breaches of contract on the part of New Venue Technologies.

16. There is a well-known principle in South Carolina contract law that a party in breach of the contract cannot complain of a subsequent breach by the other party.

17. In item 42 of the request for resolution the individuals who signed the Request for Resolution on behalf of the State stated “(i) deliver the supplies or perform the services within the time specified in this contract or any extension...” The individuals who signed the Request for Resolution on behalf of the State left out the second part of the sentence.

18. The individuals who signed the Request for Resolution on behalf of the State intentionally left out information and prematurely ended their quotation in item 42 of the request for resolution. What was left out of item 42 makes it clear that the individuals who signed the Request for Resolution on behalf of the State knew that the State was in breach and was first to breach. It is clear that the individuals who signed the Request for Resolution on behalf of the State were well aware of the State’s initial complete breach of contract, continued breach of contract and that any failures of NVTI were a subsequent related result of the State’s breach of contract. Indeed, NVTI had specifically put these individuals on written notice of such breach, repeatedly.

19. Because the State was the first to breach and any failure on the part of New Venue Technologies was subsequent and related to the State’s breach of contract, the individuals who signed the Request for Resolution on behalf of the State knew or should have known that it would be impossible to prevail in contested litigation using the Request for Resolution signed on September 30, 2013.

20. ITMO never intended to confront contested litigation with the Request for Resolution, and to this day, evades all attempts by NVTI to put the related, prior breach by the State to a prompt hearing before an impartial hearing officer as required by law.

21. The request for resolution was withdrawn on November 7, 2013 by the State and ITMO prior to a hearing on the request for resolution. This withdrawal enforces the belief the State was aware of serious defects with the allegations of the State's Request for Resolution. Withdrawal indicates the State had no intention of proceeding to a contested hearing with its request for resolution.

22. The State's withdrawal of its Request for Resolution denied New Venue Technologies the opportunity to litigate and show the falsity of allegations of vaporware and falsity of allegations of breach of contract contained in the State's Request for Resolution, all of which remains falsely published on the State's official procurement website, to NVTI's serious detriment.

### **FRIVOLOUS PLEADINGS**

23. The State's Request for Resolution contained allegations quoted in paragraph 13 of this Motion for Sanctions. These allegations falsely stated and insinuated that the Software Acquisition Manager developed by New Venue Technologies did not exist and insinuated that New Venue Technologies had created vaporware as a solution for the State of South Carolina's needs.

24. ITMO employees Singleton, Hall, and Lemmon, who signed the request for resolution, and ITMO employee Kirwan, who helped investigate and draft the allegation of vaporware in the State's Request for Resolution, knew or should have known the software developed by New Venue Technologies existed and had reporting functionality because: 1) These employees and other employees from ITMO attended and participated in demonstrations of the

software, 2) These employees and other employees from ITMO requested and were provided numerous reports from the software, 3) An invitation to Mr. Kirwan to view and inspect the software in late September, 4) the use of the software by procurement officers throughout the State of SC for over two years to place orders.

25. ITMO's inquiry into these allegations was not reasonable, because Mr. Kirwan failed to inspect the software when invited to do so on September 26, 2013.

26. This is an allegation of fact and there is no reasonable interpretation of law or a good faith argument for the extension, modification, or reversal of existing law that warrants the allegation that New Venue Technologies' Software Acquisition Manager is vaporware.

27. The allegation that New Venue Technologies' Software Acquisition Manager is vaporware was made for an improper purpose, to increase the cost of litigation, harass, and damage the reputation of a company who develops custom software solutions, all as improper counter-measures to attempt to fend off NVTI's meritorious contract controversy claims.

28. The inclusion of allegations of creating vaporware caused unnecessary increase in the costs of litigation through attorney's fees for time spent preparing for said allegations.

29. The request for resolution was distributed beyond the necessary parties for litigation of this matter and to parties for which there is no reasonable link to this litigation.

30. Distribution of the request for resolution caused harm to the reputation and good will of New Venue Technologies.

31. Distribution of the request for resolution caused New Venue Technologies to lose other business.

32. Distribution of the request for resolution caused certifications necessary for other business to be denied.

33. The allegations known to be false by State Budget and Control Board and ITMO employees was drafted to cause harm to New Venue Technologies and did in fact cause harm.

### **TIMELINESS OF MOTION FILING**

34. Mr. Mike Spicer of ITMO, who played a role in negotiating this very contract between the State and NVTI, was initially assigned as the hearing officer for this contract dispute. Mr. Spicer works and reports to a signatory of the State's Request for Resolution, Mr. Delbert Singleton.

35. The State's Request for Resolution was withdrawn by email from Frank Potts on November 7, 2013.

36. The request for resolution withdrawal was placed on the web with a broken link.

37. When the link was repaired on November 18, 2013, Mr. Pott's email retracting the State's request for resolution appeared below an order from hearing officer Mike Spicer indicating the hearing in this matter was postponed indefinitely. The file on the State's website on November 18 is called State\_Withdraw\_of\_Request\_for\_Resolution\_Case\_Number\_214-205.pdf

38. The Budget and Control Board internet site has since replaced the withdrawal posted on November 18 with a different file that does not include Mr. Spicer's Order. The new file is called Case\_Number\_214-205-withdraw\_of\_Request\_for\_Resolution.pdf.

39. Mr. Spicer's order relates to the Request for Resolution, and the administrative removal of Mr. Spicer's order from the record does not negate the fact that Mr. Spicer issued an order on the State's request for resolution.

40. Mr. Spicer's Order issued on November 18, postponing the hearing scheduled for November 25, 2013 is an order related to the withdrawal of the State's Request for Resolution, which would have been heard on November 25, 2013.

41. This motion for sanctions is filed within 15 days of both Mr. Potts' withdrawal of the State's Request for Resolution on November 7, 2013, and Mr. Spicer's Order. This request for sanctions is timely filed within 15 days of final disposition of the Request for Resolution and an order related to that disposition.

**PRAYER FOR RELIEF**

New Venue Technologies seeks an award of damages for the costs and damages from lost business, damage from inability to obtain necessary certification to compete for Federal contracts, damage to good will, attorneys' fees and costs, as well as all remedies available in this matter and such other and further relief as the Procurement Panel deems appropriate.

RESPECTFULLY SUBMITTED,

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